No. 20,872

IN THE

United States Court of Appeals

For the Ninth Circuit

ARISTA CIA. DEVAPORES, S.A.,
Appellant,

vs.

HOWARD TERMINAL,
Appellee.

BRIEF FOR APPELLEE

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

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JURISDICTION

Appellee concurs in Appellant's statement concerning jurisdiction.

ARGUMENT

I. IN EACH OF THE CASES CITED BY THE STEVEDORE IN SUPPORT OF ITS POSITION EITHER THE NEGLIGENCE RENDERED THE VESSEL UNSEAWORTHY OR THE LONGSHOREMAN'S INJURY WAS NOT SOLELY THE RESULT OF HIS OWN NEGLIGENCE.

The shipowner here contends that the stevedore had breached its warranty of workmanlike service where there was no liability on the part of the vessel and where the sole proximate cause of the longshoreman's injury was

his own negligence. However, in each of the cases cited by the shipowner in support of this proposition the injured longshoreman's negligence rendered the vessel unseaworthy or the longshoreman's injury was not solely the result of his own negligence.

In *Damanti v. A/S Inger,* 314 F.2d 395 (2d Cir. 1963), the court stated at page 398 that "on the liability of the shipowner there was evidence that the beam jack was defective in that it was rusted, pitted, bent and with its beam holding teeth imperfect, that these defects caused it to slip off the beam and cause plaintiff and the jack to fall into the hold."

In *Guarracino v. Luckenbach,* 333 F.2d 646 (2d Cir. 1964), the court stated at page 648 that the stevedore's warranty of workmanlike service was breached in two respects which were "the abandonment of his post by the hatch boss in the face of his general instructions to stay at the hatch until a ladder was brought, and the action of libelant, when a safe alternative was available, in taking a way out likely to cause injury to himself and his fellow worker."

In *American Export Lines v. Norfolk Shipbuilding & Drydock Corp.,* 336 F.2d 525 (4th Cir. 1964), the court's decision only indicates that the shipyard "alone was responsible for its negligence" and does not indicate whether or not the libelant was himself negligent. The court does state at page 527 that "conceivably, a plaintiff's claim may be so far fetched and palpably devoid of substance as to furnish no basis for invoking an obligation of indemnity".

In *Massa v. C. A. Venezuelan Navigacion,* 332 F.2d 779 (2d Cir. 1964), "the plaintiff was injured when some of the cargo spilled from a pallet that had been raised about eight feet by the ship's winch" and the appellate court did not disturb the trial court's finding "that the accident was caused by the plaintiff and his fellow longshoremen". *Id.* at 781.

In *Strachan Shipping Co. v. Koninklyke, etc.,* 324 F.2d 746 (5th Cir. 1963), "the proximate cause of the injury was the stevedore's failure to perform its duties in a safe and workmanlike manner because it made improper use of the ship's loading facilities". *Id.* at 746. There is no suggestion in this case that the plaintiff longshoreman was injured solely because of his own negligence. This case was known as *Caswell v. K.N.S.M.,* 205 F.Supp. 295 (S.D. Tex. 1962) in the court below.

In *A/B Dalen v. Maher,* 303 F.2d 565 (4th Cir. 1962), it is apparent that the longshoreman was injured as a result of unseaworthiness on the part of the vessel attributable solely to the improper stowage of coal by the stevedore.

In *Nicroli v. Den Norske Afrika, etc.,* 332 F.2d 651 (2d Cir. 1964), cited by appellant for the first time in its brief on appeal, the longshoreman was injured partly as a result of a dangerous condition on the vessel and partly as a result of his own negligence (which was assessed as being 50%).

In *Holley v. The Manfred Stansfield,* 186 F.Supp. 212 (E.D. Va. 1960), the negligence of the injured longshoreman caused the vessel to become unseaworthy.

II. NEGLIGENCE ON THE PART OF A LONGSHOREMAN (THE SERVANT) CAUSING INJURY ONLY TO HIMSELF IS NOT A TORT AS IT IS NOT A BREACH OF A LEGAL DUTY OWED TO ANOTHER; ACCORDINGLY SUCH NEGLIGENCE ALONE WILL NOT IMPUTE NEGLIGENCE TO THE STEVEDORE (THE MASTER) TO THE END OF MAKING THE STEVEDORE LIABLE TO AN INDEMNITEE (HERE, THE SHIPOWNER).

We know of only one decision which has squarely decided the issue at bar on facts raising that issue. In *Drewery v. Daspit Bros. Marine Divers, Inc.*, 317 F.2d 425 (5th Cir. 1963), the plaintiff was employed by Daspit Bros. Marine Divers who had contracted to render maritime services to Shell Oil Co. Shell and Daspit had entered into a contract of indemnity whereunder Daspit undertook to indemnify Shell from all claims except where the claim resulted without negligence or fault on the part of Daspit. In the court of appeals it was "undisputed . . . that Daspit was not negligent otherwise than through [the plaintiff]." *Id.* at 427. In ruling on Shell's action for indemnification, the court reviewed the status of the doctrine of imputed negligence and stated:

> These authorities make it clear that imputed negligence, based as it is on a fiction, works to hold the master for injuries to third persons occasioned by the fault of his servant, and to bar the master where his servant contributes or concurs in the harm done the master. We are asked to take the doctrine one step further; to embrace the master through the imputation to the master of the negligence of the servant resulting in injury to himself, to the end of creating liability on the part of the master to an indemnitee under the terms of a contract.
>
> But this additional step does not follow for here no tort against either a third person or the master is

> present, and the legal fiction of imputed negligence rests on such a tort. Negligence causing injury to one's self will not suffice, for a tort rests on the breach of a legal duty owed another. To take this step would be adding a legal fiction to another legal fiction.
>
> . . .
>
> Thus it is that the master cannot be held unless the court is to extend the doctrine of imputed negligence to a new area, and to a point it has never reached. This we decline to do. *Id.* at 428.

We submit that the *Drewery* rationale is correct notwithstanding language in *Damanti* to the contrary. To hold otherwise would be to extend, for the first time, the indemnification covered by the stevedore's implied warranty of workmanlike performance to situations where the stevedore's performance neither gave rise to liability on the part of the shipowner nor was faulty in any respect except through the negligence of the injured longshoreman. We further submit that this is an area which is better suited to express contractual agreement rather than extension of an existing implied warranty.

III. THIS CASE IS INDISTINGUISHABLE FROM ONE WHERE THE LONGSHOREMAN'S SUIT IS COMPLETELY GROUNDLESS, SUCH AS WHERE THERE WAS NO INJURY, AND IN SUCH A CASE THERE IS NO BREACH OF WARRANTY BY THE STEVEDORE.

If a longshoreman were to bring suit without there in fact having been an injury, there would be no breach of warranty by the stevedore and the shipowner of course

could not recover its costs of defense. As was stated by District Court in its Memorandum Opinion,

> "The Shipowner (like all other property owners) must accept the burden of defending himself against unmeritorious claims of workmen invited on his premises and cannot look to the Stevedore for reimbursement."

CONCLUSION

For the foregoing reasons we submit that the Judgment of the District Court should be upheld.

Dated, San Francisco, California,
October 10, 1966.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WALTER M. SCHEY
Of Attorneys for Appellee